

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

SEP 16 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0155-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ROY BERNARD ENGBRETSON,)	the Supreme Court
)	
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063110

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Roy Bernard Engebretson

Hinton, OK
In Propria Persona

ECKERSTROM, Judge.

¶1 Petitioner Roy Engebretson was convicted after a jury trial held in his absence of possession of a dangerous drug for sale and possession of drug paraphernalia. He appealed and this court affirmed the convictions and the sentences imposed. *State v. Engebretson*, No. 2 CA-CR 2007-0280 (memorandum decision filed Aug. 12, 2008). He then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., based on the allegedly ineffective assistance of trial

counsel. The trial court denied relief without a hearing and denied Engebretson's motion for reconsideration. This petition for review followed. Absent an abuse of discretion, we will not disturb the court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 On appeal, counsel had filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), avowing he had found no meritorious or non-frivolous issues to raise on appeal. Engebretson then filed a pro se supplemental brief in which he raised a variety of issues, including alleged misconduct by an undercover police officer and the allegedly erroneous admission of methamphetamine into evidence. In this post-conviction proceeding, appointed counsel filed a notice avowing he had found "no tenable issue for review" and requested that Engebretson be permitted to file a pro se petition, which the trial court granted. In his petition, Engebretson asserted that trial counsel had been "ineffective when he failed to investigate claims of constitution[al] violations and misconduct by police officer or pursue pretrial litigation." The court construed Engebretson's petition as also alleging counsel had been ineffective in failing to object to the introduction of drug evidence at trial, failing to adequately represent him in connection with a plea offer the state had made, and failing to inform him of the trial date. In denying post-conviction relief, the court found the claims of ineffective assistance of counsel based on police misconduct and the introduction of drug evidence were precluded pursuant to Rule 32.2(a)(2) because those issues had been adjudicated on appeal. The court rejected the remaining claims of ineffective assistance of counsel on their merits.

¶3 On review, Engebretson seems to focus primarily on counsel's performance in connection with the state's plea offer, claiming trial counsel did not adequately review the offer and properly advise him so that he could make an informed decision whether to accept the offer

or reject it. Although the court acknowledged that Engebretson had raised this claim, his petition apparently referred to counsel's performance in connection with the plea only in the statement of facts, not in the portion of the petition in which he identified and argued the claim he was actually raising. He did raise and develop this claim in his reply, but an issue raised for the first time in a Rule 32 reply is not properly raised; it is waived. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7, 221 P.3d 1052, 1054 (App. 2009).

¶4 In any event, even assuming Engebretson had properly raised this claim in the petition, he has not established the trial court abused its discretion by summarily denying relief on this ground. The court found "from the record at the pre-trial conference of February 20, 2007 that the defendant was aware of the State's plea offer and knowingly rejected it." The minute entry from that date reflects that the court had questioned Engebretson about the terms and conditions of a plea offer the state had made and, according to his trial counsel, Engebretson had rejected. The court found Engebretson "has been adequately advised of the plea offer and knowingly, intelligently and voluntarily rejects the plea offer." Engebretson has not persuaded us he raised a colorable claim for relief on this ground.

¶5 To the extent his petition for review could be construed as challenging the trial court's denial of relief on his claim of ineffective assistance of counsel in connection with police misconduct and the admission of drug evidence, Engebretson has not persuaded us that summary denial of relief was improper. As we previously stated, the court found these claims precluded. First, although Engebretson mentioned counsel's performance in connection with the admission of drug evidence in the statement of facts, he did not identify this as a basis for his claim in the argument section of the petition. But even assuming, as the trial court did, that this, too, was a properly raised basis for his claim of ineffective assistance, and assuming, too, his petition for

review could be construed as raising both grounds on review, Engebretson did not raise colorable claims.

¶6 The claim of ineffective assistance of counsel is independent from the claim upon which it is based. And claims of ineffective assistance of counsel, unlike the underlying claim, can only be raised pursuant to Rule 32, not on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶¶ 9, 39 P.3d 525, 527 (2002). Consequently, the trial court erred when it found the claims of ineffective assistance of counsel that were based on police misconduct and erroneous admission of drug evidence precluded. Nevertheless, the court did not abuse its discretion in denying relief because, as we found on appeal, these issues were without merit; therefore, the related claims of ineffective assistance of counsel necessarily fail. Engebretson was not prejudiced by counsel’s performance, even assuming, without deciding, that performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance of counsel warranting relief, defendant must show counsel’s performance was deficient and prejudicial).

¶7 We grant the petition for review but deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge